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No. 93-1761

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT M. SCHMIDT AND RICHARD A. MASSMAN
CO-TRUSTEES OF THE
LEON A. SCHMIDT CHILDREN'S TRUST NO. 1,
Petitioners,

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF TEXAS

REPLY TO BRIEF IN OPPOSITION

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28 pp

QUESTION PRESENTED
(In Reply to Brief in Opposition)

Does the Court have jurisdiction to address federal questions concerning a denial of Just Compensation if first raised in a motion for rehearing before the state supreme court if such compensation had never been denied in the history of the case until that highest state court's surprising decision?

QUESTIONS PREVIOUSLY PRESENTED
(Raised in the Petition for Writ of Certiorari - Restated)

Is the measure of compensation due for the taking of property under the Constitution's Fifth Amendment the value which would be negotiated for the sale of the property in an open market transaction between private parties?

Does the Constitution's Fourteenth Amendment permit the measure of just compensation due for the taking of property to differ among classes of condemnees dependent not on the damage sustained, but on the nature and extent of the public project involved?

LIST OF PARTIES

The parties to the proceeding below were: the Petitioners, Robert M. Schmidt and Richard A. Massman, Co-Trustees of the Leon A. Schmidt Children's Trust No. 1; Austex, Ltd., a Nevada Corporation, which has filed a separate Petition for Writ of Certiorari; and the Respondents, the State of Texas and the City of Austin.

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LEON A. SCHMIDT CHILDREN'S TRUST NO. 1,
Petitioners,

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents.

Reply to Brief in Opposition

I. THIS COURT HAS JURISDICTION

Respondents incorrectly argue this Court lacks jurisdiction over this case because the federal questions which form the basis of the Petition for Writ of Certiorari were not raised earlier than in the motion for rehearing before the State Supreme Court.[1] Additionally, Respondents incorrectly argue a wrongful denial of just compensation for a taking, as suffered by Petitioners, can be and here was founded on

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[1]Respondents' Brief in Opposition (hereinafter "Res. Brief") at pp. 2-5, wherein Respondents also concede the federal questions were raised in the motion for rehearing, at p. 2.

independent and adequate, substantive state law grounds.[2] However, this Court has repeatedly held that it has jurisdiction over cases where, as here, petitioners raise federal error immediately upon its occurrence. And there can never be independent and adequate, substantive state law grounds which can be used to deny a citizen federal constitutional guarantees. Any such substantive state law grounds must yield to the mandate of the United States Constitution.

Petitioners won this case before the state trial court and court of appeals. Each tribunal interpreted Texas law without offending federal constitutional guarantees. As the prevailing party at both levels, Petitioners had no basis to raise any points of error, federal or otherwise, complaining of either court's conduct. Only after the State Supreme Court surprisingly ruled against Petitioners' recovery of just compensation did Petitioners have reason and grounds to raise federal issues under the Fifth and Fourteenth Amendments which follow from such a denial. Only after the highest court in the state denied just compensation for the taking of property did the federal cause of action ripen. The first opportunity for Petitioners to raise these federal issues and the federal cause of action was in the motion for rehearing before the State Supreme Court. This is what Petitioners did, is all Petitioners could have done, and is all this Court requires.

Because the State Supreme Court decision denies federal constitutional guarantees and because it cannot and does not rely on independent and adequate state law grounds, this Court has jurisdiction.

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[2]Res. Brief at pp. 5-6 and 12-18.

A. Petitioners Raised the Federal Constitutional Issues Immediately Upon The Occurrence of the Grounds to Raise Them.

Petitioners did not and could not have raised any federal constitutional issues in this case prior to the Texas Supreme Court's decision because there were none to raise. The trial court and the Texas Third Court of Appeals both agreed with the landowner that all factors taken into account in the marketplace must be taken into account when assessing associated remainder property damage in partial takings cases. Both courts found the elements of damage in this case would be taken into account in marketplace negotiations and were not otherwise noncompensable. The State argued to the trial court and court of appeals that this measure of damages overcompensated Texas landowners--that the Texas Just Compensation Clause (the "adequate" compensation required of Art I, Sec. 17, of the Texas Constitution) did not envision such complete compensation. Significantly, this issue--the maximum extent of compensation available to Texas landowners--is strictly one of state law. As this Court noted in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294-295, 102 S.Ct. 1070, 1077 (1982), the Texas constitution may provide "arguably significantly broader" guarantees than the federal Constitution. In fact the Texas Just Compensation Clause is more broadly written than the Fifth Amendment and requires compensation for both takings and damagings. TEX. CONST. art. I, Sec. 17. Thus, when the issue is the maximum extent of just or adequate compensation, the issue is

necessarily one of state law.[3] This was the issue in this case at both the trial and appellate levels.

Federal issues did not arise until the Texas Supreme Court issued its opinion adopting a Texas standard for just compensation which so narrowly defined landowners' rights to just compensation in partial takings cases that it fell through the floor of minimum protection required by the Fifth and Fourteenth Amendments to the United States Constitution. Prior to this opinion, Texas courts had applied Texas law consistent with federal constitutional guarantees and Petitioners' recovery of remainder property damages, as shown in the state court of appeals opinion in this case. *State v. Schmidt*, 805 S.W.2d 25 (Tex. App.--Austin 1991), *reversed*, 867 S.W.2d 769 (1993).

The Texas rule for measuring remaining property damage in a partial taking case had been that established in *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194 (1936). As the State Supreme Court wrote in *Schmidt*, "The rule in the *Carpenter* case, which is as settled as any in our jurisprudence can be, is the basis for the position taken by [Petitioners]." *State v. Schmidt*, 867 S.W.2d 769, 773 (Tex. 1993). The Texas Supreme Court set out the following rules from *Carpenter* for calculating remainder damages in partial takings cases:

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[3]For example, assume that the Texas Constitution's Just Compensation Clause is broader than the Fifth Amendment. Then, theoretically, a Texas appellate court could have reversed the *Schmidt* trial court's ruling on the just compensation issue and dictated a narrower, less protective standard which, nevertheless, was still broader than the protection provided by the federal Constitution. Thus, in theory, Respondents could have argued for a Texas just compensation standard, which, while narrower than the trial court and court of appeals standard, was still broader than the federal standard.

> ...[T]he damages are to be determined by ascertaining the difference between the market value of the remainder of the tract immediately before the taking and the market value of the remainder of the tract immediately after the appropriation, taking into consideration the nature of the improvement, and the use to which the land taken is to be put. ...[E]verything which affects the market value of the land itself, having due regard for past and probable future injuries, may be accurately reflected by ascertaining the difference in value, when all the legitimate testimony is properly submitted to the jury for consideration.
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> * * * * * *
>
> **Generally, it may be said that it is proper as touching the matter of the value and depreciation in value to admit evidence upon all such matters as suitability and adaptability, surroundings, conditions before and after, and all circumstances which tend to increase or diminish the present market value.** Evidence should be excluded relating to remote, speculative, and conjectural uses, as well as injuries, which are not reflected in the present market value of the property.

Schmidt, 867 S.W.2d at 772-773 (emphasis added), quoting from *Carpenter*, 89 S.W.2d at 197-198, 200. In deciding to ignore *Carpenter* and its requirement that just compensation mirror marketplace idemnification, the Texas Supreme Court chose to ignore revered state precedent upon which Petitioners had justifiably relied.

In order to reverse the trial court and court of appeals' application of Texas law to the facts of this case, the State Supreme Court further had to give new constructions to earlier case law and had to specifically disapprove two other state decisions which had supported Petitioners' recovery in this case. *Schmidt*, 867 S.W.2d at 777. In one of these two cases specifically disapproved, *Milam County*

v. Akers, 181 S.W.2d 719 (Tex. Civ. App.--Austin 1944, *writ ref'd w.o.m.*),[4] the disapproved holding earlier had been approved by virtue of the Supreme Court's denial for want of merit of a writ application filed therein. In the other, *State v. Buck*, 489 S.W.2d 642 (Tex. Civ. App.--Corpus Christi 1972, *writ ref'd n.r.e.*),[5] the Supreme Court earlier had found no reversible error.

This Court has consistently held that when a party could not reasonably have been expected to raise the federal issue prior to a motion for rehearing in the state court proceedings, that error is timely raised if raised in the motion for rehearing. *Missouri v. Gehner*, 281 U.S. 313, 50 S.Ct. 326, 327 (1930); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320, 37 S.Ct. 638, 639-640 (1917); and, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 86, 100 S.Ct. 2035, 2043 (1980). These cases stand for the proposition that this Court has jurisdiction to address federal error first raised on motion for rehearing before the state Supreme Court where (a) the decision of the state Supreme Court changes the rules on which a petitioner had been successfully relying in lower court proceedings, and (b) that surprising change in the law of the case is itself what first gives rise to federal error. In the subject case, federal issues did not exist until the Texas

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[4]The *Carpenter* rule was the basis for *Milam County*'s holding. *Milam County*, 181 S.W.2d at 722.

[5]The *Carpenter* rule was the basis for *Buck*'s holding. *Buck*, 489 S.W.2d at 646.

Supreme Court issued its opinion. [6] Petitioners' motion for rehearing raising the federal error was denied.

Respondents improperly rely on *Yee v. Escondido*, -- U.S. --, 112 S.Ct. 1522 (1992), to suggest Petitioners raised the subject federal questions too late in the proceedings. In *Yee*, the petitioners had throughout their litigation attempted to invalidate a local ordinance. The grounds raised to support their argument were based on a taking claim. It was not until after the state Supreme Court had ruled on that claim contrary to their position that the Yees sought to raise a due process claim. Since they were seeking affirmative judicial relief in trying to change local law, they had the burden to raise all their grounds timely. This Court correctly refused to consider the belatedly filed and supplementary due process argument since the Yees could have raised the argument earlier, and should have raised the argument earlier, but did not do so. In the subject case, Petitioners were the prevailing defendants in the trial court, could not and would not complain of judicial rulings in their favor, and were not put in the position of seeking relief from the appellate courts until the Texas Supreme Court ruled against them. Petitioners are not raising a late, supplementary argument to invalidate an application of Texas law which could have been raised earlier. Petitioners had no complaint with the application

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[6]Petitioners have not and do not argue that either Secs. 21.042(c) or 21.042(d) of the Texas Property Code are on their face violative of federal constitutional guarantees. Both can be applied constitutionally as did the trial court and the court of appeals when each supported Petitioners' recovery and when each found that the damages sought were compensable consequences of the taking and not community in nature.

of Texas law to the facts of their case until the State Supreme Court changed the law of the case and the interpretation of the statute.

B. Petitioners' Federal Cause of Action Did Not Ripen Until the State Supreme Court's Denial of Compensation

A federal cause of action did not exist prior to the Texas Supreme Court's decision which denied Petitioners the compensation awarded by the lower Texas courts. The black letter law of this Court is that no claim for just compensation under the Fifth Amendment exists until the highest state court has denied the landowner compensation. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 3120-3121 (1985). Petitioners raised their federal Fifth Amendment claim or cause of action at the first and only time they could have done so in the state proceedings: on the motion for rehearing. Raising a Fifth Amendment claim earlier might well have been sanctionable.

C. The Texas Supreme Court's Decision Was Neither "Independent" of Federal Law Nor Based On "Adequate" State Law Grounds

1. Decision Not "Independent" of Federal Law Because It Was Interwoven with Federal Law.

Respondents incorrectly suggest the Texas Supreme Court's decision was based on "independent" state law grounds which will defeat this Court's jurisdiction. Even a cursory examination of the decision reveals this is not so. *Schmidt*'s central holding is in part IV of the opinion. *State v. Schmidt*, 867 S.W.2d 769, 777-779 (Tex. 1993). It is in this part of the opinion that the court holds that Texas

landowners are only entitled to remainder damages caused by the project if the property taken from them is "indispensable, substantial, and inseparable" from the project. *Schmidt*, 867 S.W.2d at 778. This holding is derived from federal law and centers on *Campbell v. United States*, 266 U.S. 368, 372, 45 S.Ct. 115, 117 (1924), and its Ninth Circuit offshoot, *United States v. 15.65 Acres of Land*, 689 F.2d 1329, 1332 (9th Cir. 1982). The reliance on federal law brings the subject case squarely within the rule this Court set forth in *Three Affiliated Tribes v. World Engineering*, P.C., 467 U.S. 150, 152, 104 S.Ct. 2267, 2276 (1984):

> [T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. In some instances, a state court may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements. ... If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law.

The Texas Supreme Court's misperception of federal constitutional law as embodied in *Campbell* drove the *Schmidt* holding. Accordingly, this Court has jurisdiction to correct this misapprehension to assure compensation consistent with the Fifth Amendment. See also, *Michigan v. Long*, 463 U.S. 1032, 1040, 103 S.Ct. 3469, 3476 (1983) (Supreme Court will review cases where state court decision rests on, or is interwoven with, federal law).

2. Decision Not Based on "Adequate" State Law Grounds Because It Denies Federal Rights.

The *Schmidt* decision runs afoul of federal constitutional law. It is fundamental that a state court application of state law that violates federal law is reviewable by this Court. *Howlett v. Rose*, -- U.S. --, 110 S.Ct. 2430, 2437 (1990). Since *Schmidt* defines just compensation in Texas partial takings cases to be less than the minimum compensation required by the Fifth Amendment, *Schmidt* creates state law which violates the federal Constitution and diminishes federal rights. There can be no adequate state law grounds for violating federal constitutional guarantees. *Id.*, at 2439-2440.

II. RESPONDENTS HAVE MISCHARACTERIZED THE RECORD

The error of the Texas Supreme Court lies in the misguided measure of just compensation adopted when it failed to follow the marketplace valuation standard,[7] not in any failure to appreciate the factual nuances of this case. Nevertheless, Respondents have cast doubt on Petitioners' recitation of the facts by making two "exceptions" to Petitioners' reference to the facts giving rise to the diminution in value of the remaining property not taken. These exceptions are wholly without merit, as easily ascertained by reading the record.

Respondents represented to this Court there was "no evidence" of mountainous piles of dirt to be placed in front of Petitioners' property

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[7] *United States v. Miller*, 317 U.S. 369, 374 (1942); and *see*, Petition for Writ of Certiorari (hereinafter "Petition") at p. 7.

in connection with the project. Yet, photographs showing otherwise were admitted at trial as condemnees' exhibits nos. 9 and 16, some of which are attached hereto in the Appendix, at A-1 to A-7, infra. The dirt barriers shown,[8] incident to the project for which Petitioners'

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[8]While these photographs show construction activity only near the subject property (at time of trial such activity had not reached the subject), the State's engineer provided the evidence such piles would be in front of the subject:

Q: Some of the construction out there incident to this highway project where the utility relocation otherwise has already begun on Highway 183, hasn't it?

A: Yes. I think at the Burnet Road area. I'm not aware of any that has begun in the area in front of this property in question.

Q: But there is some that's at Burnet Road heading a little bit - maybe a little bit east towards this property; is that correct?

A: I believe that's correct.

Q: That's the same kind of construction that's going to move down the road all the way to I-35; is that correct?

A: **There will be construction all the way to I-35** [passing in front of the subject property], yes, sir.

Q: And it's the same kind of construction that we see there now?

A: Generally, part of the area up around Burnet Road was letting a separate contract. There are a number of specifications and requirements that are different on the project that is adjacent to the property in question.

Q: But we're talking about the same kind of construction equipment, same kind of utility?

A: Generally, yes.

Q: Okay. **While there are different specifications, visually it is going to be fairly the same; is that correct?**

A: **Yes.**

S.O.F. p. 142, l. 6 - p. 143, l. 6.

property was taken, are much more than sufficient to cause the diminution of adjacent property market value as found by the jury. Such had been conceded by Respondents. *Schmidt*, 867 S.W.2d at 773.

Respondents also contend that there is "no evidence" that after this project is completed the retail building on the remainder will appear as if "inside a cavern." Not only did the jury see large, scaled drawings of the effect of being immediately adjacent to a four story tall road structure (condemnees' exhibits nos. 1, 2, and 10), the jury heard direct testimony from a land planner expert witness who was the one who first made use of this "cavern" description and put it into evidence:

> Q: What about visibility from the property towards the main lanes, is that a factor?
>
> A: It's certainly a factor in the sense of what you have from a standpoint of what you had today versus what it would be in the future. The existing site today looks out over the - building looks out over an at-grade roadway, in this case, a six-lane roadway, and in the future it is going to be looking out at a - basically an elevated section with 120 feet below it, it's, for all practical purposes, like a **large cavern**.

S.O.F., p. 199, ll. 5-15.

By only challenging these two of the many factual representations made by Petitioners regarding the evidence presented at trial, Respondents concede the truth of the others.[9] As shown above, there was no basis to challenge any of Petitioners' factual representations. What the evidence shows is that Petitioners' remaining

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[9]Petition at pp. 3-4.

property after the taking was severely damaged by virtue of the project for which the taking was necessary. The damages suffered by Petitioners were suffered for the shared community's benefit. The Fifth Amendment provides Petitioners the guarantee that the community will similarly share in the cost.

CONCLUSION

This Court has jurisdiction to consider this case. Federal error was raised at the first appropriate time, the motion for rehearing before the State Supreme Court. Up until that point, Petitioners had been the prevailing party and there was no error of any kind of which to complain. Not until the decision of the State Supreme Court, which ignored or disapproved established state precedent, was there a federal issue or a ripe claim for the taking of property without just compensation. There can be neither independent nor adequate substantive state law grounds to deny a citizen rights guaranteed by the United States Constitution.

Not only does this Court have jurisdiction to consider this case, it should grant review on the merits. Petitioners reurge the reasons given for granting the writ.[10] This Court has recently provided guidance as to determining when compensation is required by writing on what facts give rise to a taking, but guidance is still needed on the measure of compensation when a taking is admitted. When a property owner's land is damaged through the construction or operation of the public project, with no associated taking of all or a portion of that land,

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[10]Petition at pp. 6-21.

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[10]Petition at pp. 6-21.

there is no automatic entitlement to compensation. That landowner must first establish liability through successfully proving that a taking occurred in an inverse condemnation action in order to recover. When a property owner's land is partially condemned for the public project, a taking is established as a matter of law. Liability is admitted and is not at issue. The only issue present in such a situation is the proper measure of damages and that is the issue now before this Court. Petitioners argue this measure is constitutionally tied to indemnification as would occur in the marketplace.[11]

The difference between a landowner who receives compensation and one who does not depends on the ability of each to establish a taking. In the subject case, the taking is admitted. Compensation measured by the consideration that would be received in the marketplace provides justice and constitutionally guaranteed relief and protection and must not be denied Petitioners.

Respectfully submitted,

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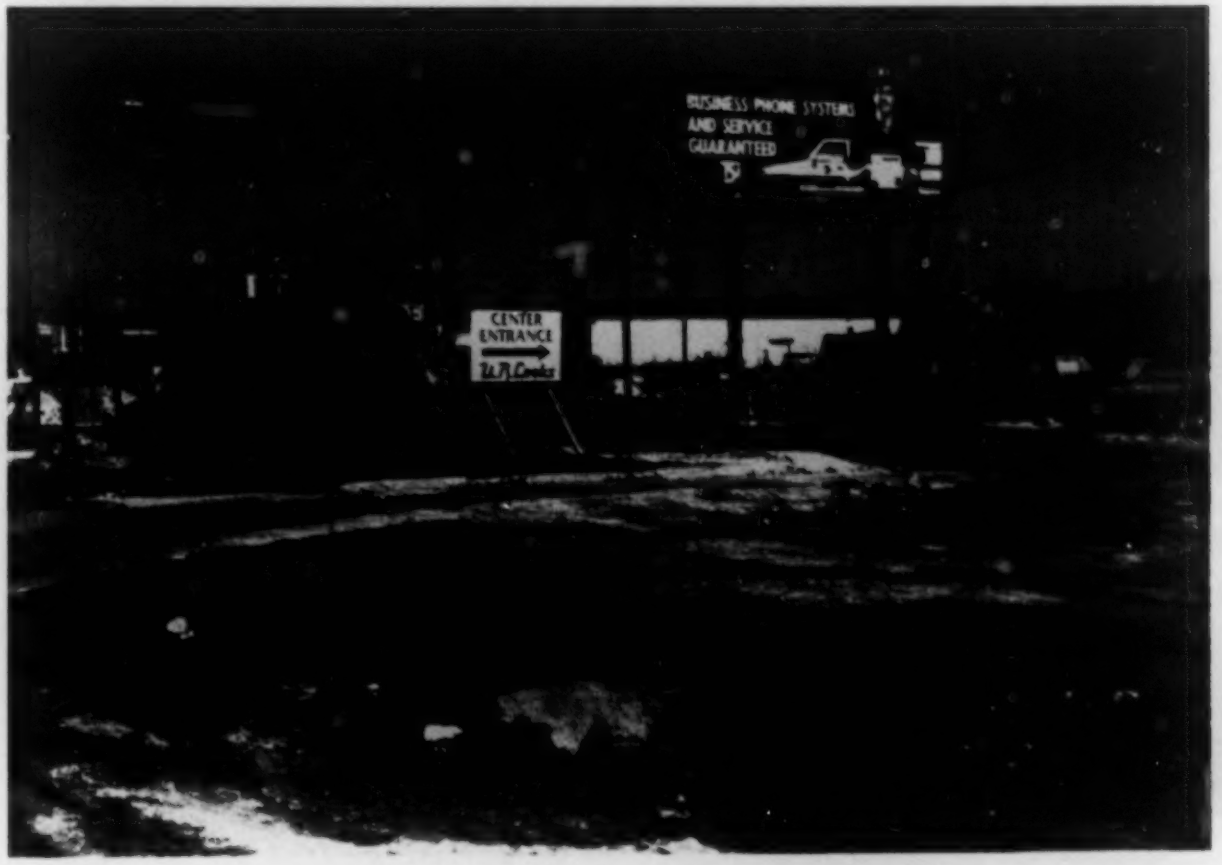
[11] See text and case law in Petition at p. 7.

PHOTOGRAPHS TAKEN FROM

CONDEMNEES' (PETITIONERS')

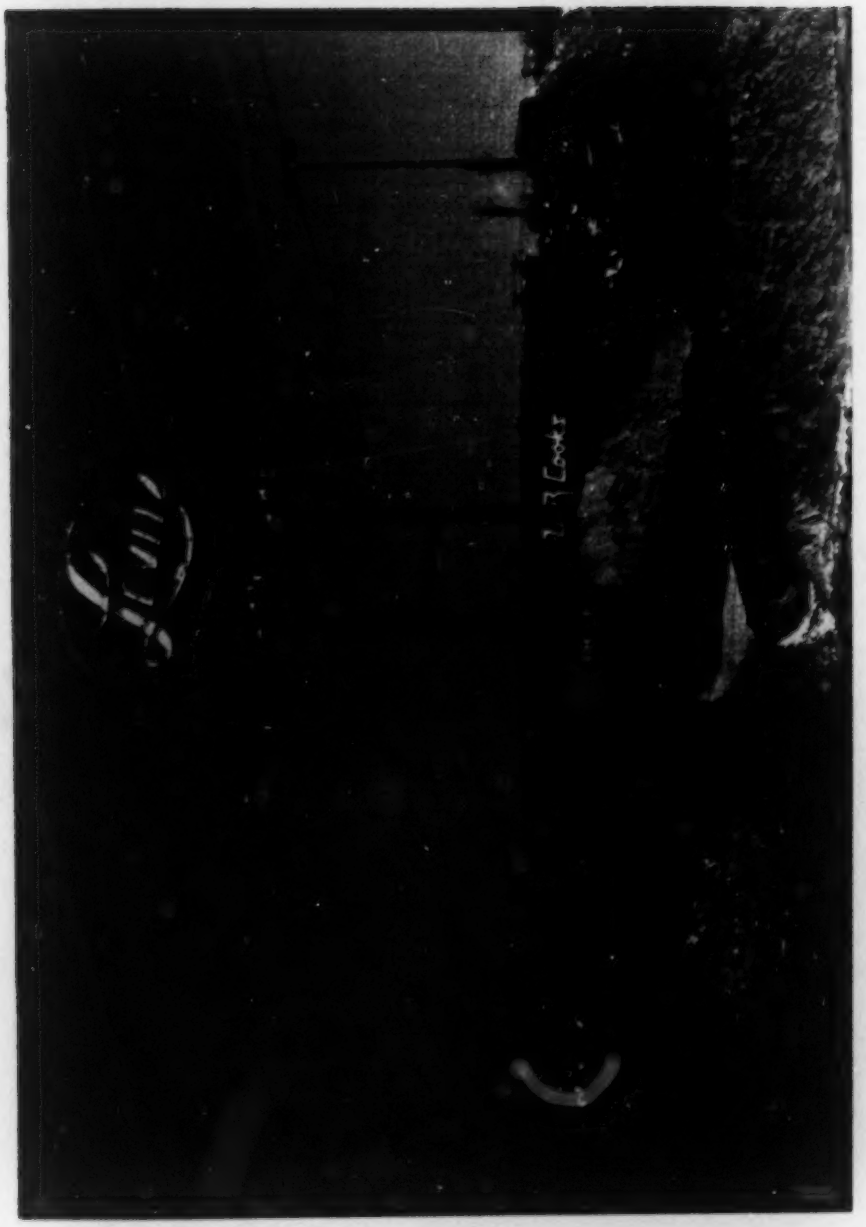
TRIAL EXHIBIT NO. 9

A-2


BUSINESS PHONE SYSTEMS
AND SERVICE
GUARANTEED
CENTER
ENTRANCE
W.R. Cooks

A-4

LEASING
328-4064
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LADD'S